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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE
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10 JOHN GIBSON, a married man, on behalf of
himself and his marital community,

11 Plaintiff,

12 v.

13 KING COUNTY, a municipal corporation of the
14 State of Washington, STEPHANIE WARDEN,
15 Director of King County Department of
Development and Environmental Services, in her
16 official and individual capacities, JIM RANKIN,
King County Fire Marshal, in his official and
17 individual capacities, LESLIE EATON, in his
official and individual capacities, and
18 LAWRENCE CANARY, in his official and
individual capacities,

19 Defendants.
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No. C04-1940MJP

ORDER ON DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

21 Defendants have moved for summary judgment on all of Plaintiff's claims. Neither side has
22 requested oral argument on this motion, and the Court does not find that oral argument is necessary to
23 rule on this matter. Having received and reviewed Defendants' Motion, Plaintiff's Response, and
24 Defendants' Reply, and all exhibits and documents submitted therewith, the Court hereby DENIES in
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2 part and GRANTS in part Defendants' motion for summary judgment, consistent with the discussion
3 below.

4 **BACKGROUND**

5 Plaintiff was a King County arson investigator who applied for a promotion to Assistant Fire
6 Marshall. Plaintiff was one of two finalists, but was not offered the position. The position was instead
7 offered to the other finalist, Defendant Canary. Plaintiff is African-American. Defendant Canary is
8 Caucasian. Plaintiff initially raised a complaint within the Department and then lodged a formal
9 complaint that the decision not to promote him was racially motivated. King County conducted an
10 internal investigation, which ultimately determined that the decision was not racially motivated.
11 Plaintiff brings claims of state law discrimination and hostile racial environment under RCW
12 49.60.030(1)(a) and 49.60.180(3), retaliation under RCW 49.60.210(1), aiding and abetting unfair
13 practices under RCW 49.60.220, violations of 42 U.S.C. § 1981. Both sides also address in the
14 current motion an implied constructive discharge claim. Defendant now seeks summary judgment on
15 all claims.

16 **ANALYSIS**

17 **I. Summary judgment standard**

18 In discrimination cases, the issue on summary judgment is whether, on the facts before the
19 court, a reasonable judge or jury could find that an employer acted with an illegal motive. deLisle v.
20 FMC Corp., 57 Wn.App. 79, 83 (1990). The court must view the inferences drawn from the facts in
21 the light most favorable to the nonmoving party, and reasonable doubts about the existence of a factual
22 issue are to be resolved against the moving party. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors
23 Ass'n, 809 F.2d 626, 630-631 (9th Cir 1987). In the Ninth Circuit, the standard for granting summary
24 judgment in employment discrimination cases is high, since the ultimate question is one that can "only
25 be resolved through a searching inquiry--one that is most appropriately conducted by the factfinder,

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 2 upon a full record." Johnson v. Evangelical Lutheran Good Samaritan Society, 2005 WL 2030834, *2
 3 (D.Or. 2005) citing Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir 1996) (internal
 4 citations and quotations omitted), *cert denied*, 519 U.S. 927 (1996). Thus, the plaintiff in an
 5 employment discrimination action need produce very little evidence in order to overcome an
 6 employer's motion for summary judgment. Chuang v. University of California Davis, Bd. of Trustees,
 7 225 F.3d 1115, 1124 (9th Cir. 2000). If all burdens have been met and there are competing reasonable
 8 inferences, both discriminatory and nondiscriminatory, then a jury must decide the question. Hill v.
 9 BCTI Income Fund-I, 144 Wn.2d 172, 186 (2001).

10 **II. State law racial discrimination claim and section 1981 claims**

11 Plaintiff brings state and federal racial discrimination claims under RCW 49.60.030(1)(a) and
 12 49.60.180(3), and 42 U.S.C. § 1981. In analyzing state law discrimination claims, Washington largely
 13 adopts the federal protocol announced in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) for
 14 the analysis of Title VII claims. Hernandez v. Spacelabs Medical Inc., 343 F.3d 1107, 1112 (9th Cir.
 15 2003), citing Hill v. BCTI Income Fund-I, 144 Wn.2d 172 (2001). Section 1981 claims are similarly
 16 analyzed using the legal principles under Title VII claims. Manatt v. Bank of Am., 339 F.3d 792, 797-
 17 798 (9th Cir. 2003).

18 Under McDonnell Douglas, a plaintiff must make a prima facie case of employment
 19 discrimination by demonstrating (1) he belongs to a racial minority; (2) he applied for and was
 20 qualified for a job for which the employer was seeking applicants; (3) the employer rejected plaintiff;
 21 and (4) after plaintiff was rejected, the employer continued to seek applicants from persons of
 22 plaintiff's qualifications, or the position was given to a non-racial minority applicant. McLean v.
 23 Phillips-Ramsey, Inc., 624 F.2d 70, 71 (9th Cir. 1980). Once a prima facie showing is made, a
 24 rebuttable presumption of discrimination arises and the burden of production shifts to the employer to
 25 articulate a legitimate nondiscriminatory justification for its action. Hill v. BCTI Income Fund-I, 144

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2 Wn.2d 172, 181 (2001). If the employer meets its burden of production, the presumption is dissolved
3 and the burden shifts back to the plaintiff to prove that the proffered reasons are a pretext for
4 discrimination. Id. at 182. At all times, the plaintiff retains the ultimate burden of persuasion. Id. at
5 181. A plaintiff must prove race was a "substantial factor" in an employer's adverse employment
6 decision for state law claims, and a "determining" factor for federal claims. Mackay v. Acorn Custom
7 Cabinetry, Inc. 127 Wn.2d 302, 310 (1995); Ruggles v. Cal. Poly St. Univ., 797 F.2d 782, 785 (9th
8 Cir. 1986).

9 **A. Plaintiff's prima facie case.**

10 Plaintiff makes a prima facie showing of discrimination, which is undisputed by Defendants.
11 Plaintiff is an African American and so falls within a class protected under RCW 49.60 and 42 U.S.C.
12 § 1981. He was determined by King County to possess at least minimum qualifications to proceed to
13 the interview level of the hiring process and he completed the interview panel process. Plaintiff was
14 then denied a promotion to the position of Assistant Fire Marshal, and the job was instead given to a
15 Caucasian candidate. Thus, the four criteria of (1) protected class; (2) meeting employer's legitimate
16 expectations; (3) adverse employment action; and (4) non-protected class employee treated more
17 favorably are met.

18 **B. Defendants' legitimate nondiscriminatory explanation.**

19 Defendants offer several nondiscriminatory explanations as to why Defendant Canary was the
20 better qualified applicant for the Assistant Fire Marshall position, including Plaintiff's multiple failures
21 of the Washington State Patrol Fire Investigator written certification, and Defendant Canary's superior
22 education, management, and leadership experience, higher productivity and investigation clearance
23 rate, and superior interview performance. Defendants thus meet their burden of production by
24 providing legitimate nondiscriminatory explanations for their hiring decision.

C. Pretext.

Plaintiff then has the burden to introduce evidence from which a reasonable jury could infer that Defendants' articulated reasons are pretextual. This can be demonstrated "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Chuang v. University of California Davis, 225 F.3d 1115, 1123-24 (9th Cir. 2000) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). A plaintiff need offer "very little" direct evidence to raise a genuine issue of material fact, but where a plaintiff relies on circumstantial evidence, that evidence must be "specific and substantial" to defeat the employer's motion for summary judgment. Johnson v. Evangelical Lutheran Good Samaritan Society, 2005 WL 2030834, *6 (D.Or. 2005), citing Coghlan v. American Seafoods Co., LLC, 413 F.3d 1090, 1095 (9th Cir. 2005) (citations and footnotes omitted).

Plaintiff sets forth several items as direct and circumstantial evidence of racially disparate treatment in the hiring process. Plaintiff first raises the lack of diversity on the interview panels. Panel diversity, while not strictly mandatory, was understood by other King County employees as an established policy, and it was also considered desirable in terms of the comfort level of minority applicants. (Moore Dep. 28:9-31:7; Graves Dep. 22:18-23:5; Frawley Dep. 47:4-48:2). According to the initial EEO report, Defendant Rankin's explanation for the lack of diversity on the interview panels was his inability to find any qualified persons of color to serve; he also admitted that he did not seriously consider panel diversity since he was not required to do so. (Plaintiff's Exhibit 3, pp.80-81). However, the EEO investigator at that time made a finding that since there were qualified minority Fire Marshalls in Seattle and Auburn, Defendant Rankin's proffered explanation was direct or circumstantial evidence of impermissible racial motives in the hiring process. (Plaintiff's Exhibit 3, p.

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2 81, 85; Plaintiff's Exhibit 44, p.206). The investigator's conclusion was later modified without
3 explanation in her final report to determine that the findings suggested Rankin "could not find any
4 qualified persons of color to sit on the interview panel because he was not required to look."
5 (Plaintiff's Exhibit 2, p.63). The lack of panel diversity and the issue of the comfort of non-white
6 candidates was also raised as a concern prior to the commencement of the interview process, without
7 result. (Frawley Dep. 46:4-47:17). Defendants' argument that Defendant Rankin was not seeking
8 panelists from Seattle and Auburn is questionable, since a Fire Marshall from Auburn sat on one of the
9 panels. (Defendant's Reply at 4; Plaintiff's Exhibit 2 p.62). The potential effect of a non-diverse panel
10 on Plaintiff's interview performance is relevant to his claim, and the evidence presented creates a
11 competing reasonable inference regarding the lack of diversity on the interview panels that alone is
12 sufficient to survive summary judgment on Plaintiff's discrimination claims.
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14 Plaintiff has also set forth evidence of possible disparate treatment in the hiring process.
15 Specifically, Defendant Canary was allowed to act in the Assistant Fire Marshall position on two
16 separate occasions constituting nearly all of the three-week period prior to the interview process.
17 (Plaintiff's Exhibit 19-21). Plaintiff requested a like opportunity to temporarily serve in the position
18 but was denied. (Gibson Decl. at 4). The issue of the appearance of unfairness created by this
19 decision was raised with Deputy Director King, who rejected the suggestion that the temporary
20 position be rotated between the two candidates. (Frawley Dep. 50:7-52:7). The EEO investigator
21 also initially noted an understanding by other employees that the position belonged to Defendant
22 Canary before the hiring process was completed. (Plaintiff's Exhibit 44, p.204). The evidence thus
23 creates a competing reasonable inference as to whether Defendant Canary was given advantages in the
24 hiring process that were racially motivated.
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2 Plaintiff has thus met his burden to avert summary judgment on his state law and section 1981
3 racial discrimination claims.

4 **III. Hostile racial environment claim**

5 A racially hostile work environment is established by evidence of conduct of a racial nature
6 severe or pervasive enough that a reasonable person would find it hostile and abusive; the victim must
7 also subjectively perceive the environment to be abusive such that the conduct has actually altered
8 conditions of the plaintiff's employment. Harris v. Forklift Systems, Inc. 510 U.S. 17, 21 (1993).
9 Washington courts employ the federal "totality of the circumstances" analysis in determining whether
10 a hostile work environment exists in violation of RCW 49.60, taking into account all factors including
11 the frequency and severity of conduct, and whether it unreasonably interferes with an employee's work
12 performance. MacDonald v. Korum Ford, 80 Wn.App. 877, 885 (1996). The effect on the
13 employee's psychological well-being is relevant to the inquiry, but no single factor is required. Harris,
14 510 U.S. at 23.
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16 Plaintiff has set forth sufficient evidence by which both an objectively and subjectively hostile
17 racial environment could be inferred. First, Plaintiff presents evidence that a co-worker, who was
18 previously disciplined for making a racist epithet, attempted to spread false rumors that Gibson was
19 unable to read, write, or speak in complete sentences during the EEO investigation of Plaintiff's
20 complaint. (Plaintiff's Exhibit 2, p.59). The EEO investigator also determined that at least eight other
21 employees had heard similarly false rumors of Gibson's illiteracy. Id. Plaintiff's evidence also
22 demonstrated that several employees offered testimony to the EEO investigator regarding racially
23 charged statements and racially disparate treatment and hiring practices generally within the
24 department. (Plaintiff's Exhibit 2, p.65; Plaintiff's Exhibit 25, Plaintiff's Exhibit 44, p. 200). In its
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2 letter of July 27, 2004, the King County Prosecutor's Office acknowledged its intent to investigate
3 employee claims regarding race issues, though to date it does not appear from the record that an
4 outside investigation has been conducted. (Plaintiff's Exhibit 8; Graves Dep. 55:2-5). The EEO
5 investigator also received statements from several employees regarding Gibson's social isolation in the
6 workplace and the potential relationship of this isolation to race issues. (Plaintiff's Exhibit 2, pp.55-
7 57).

8 Plaintiff's evidence also demonstrates that the EEO investigator's findings changed over time
9 from an initial determination of direct and circumstantial evidence of racism to a finding of neither
10 overt nor circumstantial evidence sufficient to establish a clear discriminatory motive, subsequent to
11 editing by the King County Prosecutor's office. It is not clear from the record why the EEO
12 investigator's conclusions changed or whether it was as a result of the Prosecutor's editing. This
13 evidence raises a question of fact as to whether the final report's modified conclusions reflect and were
14 a part of a racially hostile environment subjectively experienced by Plaintiff.
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16 Plaintiff has set forth sufficient evidence by which a trier of fact could find that a reasonable
17 person in Plaintiff's workplace was objectively and subjectively racially hostile such that it altered
18 conditions of his employment.

19 **IV. Retaliation claim**

20 To make a prima facie showing of retaliation under RCW 49.60.210, a plaintiff must show that
21 1) he engaged in protected activity; 2) the employer took adverse employment action; and 3) there is a
22 causal link between the protected activity and the adverse action. Hines v. Todd Pacific Shipyards
23 Corp., 127 Wn.App.356, 374 (2005), citing Milligan v. Thompson, 110 Wn.App. 628, 638 (2002).
24 The same McDonnell Douglas burden shifting analysis applies to state law retaliation claims. Renz v.
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2 Spokane Eye Clinic, P.S., 114 Wn.App. 611, 618 (2002). In order to meet his initial burden, a
3 plaintiff must allege that an actual adverse employment action was taken against him, such as a
4 discharge. Graves v. Dept. of Game, 76 Wn.App.705, 712 (1994); see also Bierlein v. Byrne, 103
5 Wn.App. 865, 867 (2000) (plaintiff failed to specify discriminatory or retaliatory conduct by
6 defendant); Harris v. City of Seattle, 315 F.Supp. 1112, 1125 (W.D.Wash. 2004) (in state law
7 retaliation claim, adverse employment action includes termination, demotion, reassignment with
8 significantly different responsibilities, or significant reduction in pay or benefits).

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10 Plaintiff engaged in protected activity by complaining of disparate treatment in the hiring
11 process, which led to the launch of an internal investigation. However, Plaintiff fails to establish a
12 genuine issue whether Defendants took an adverse employment action against him after he lodged his
13 complaint. Beyond general allegations, Plaintiff only points to three actual actions by his employer,
14 namely a temporary change of his schedule, the packing up of his belongings subsequent to his
15 departure, and the anonymous return of his office plaque. These incidents are insufficient to create a
16 genuine issue of material fact as to whether Defendants retaliated against him.

17 **V. Constructive discharge claim**

18 Plaintiff did not make an express claim for constructive discharge in his complaint. However,
19 Defendants raised this claim in their moving papers. The Court is reluctant to rule on a claim that
20 cannot be found in the pleadings, particularly one that could theoretically be inferred in any case. Even
21 if the complaint could be stretched so far as to suggest an implied constructive discharge claim,
22 Plaintiff has failed to present sufficient evidence that his working conditions were so intolerable at the
23 time he resigned to survive summary judgment on this claim. See Brooks v. City of San Mateo, 229
24 F.3d 917 (9th Cir. 2000) (where plaintiff alluded to constructive discharge claim in her moving papers,
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2 district court did not err in deciding that claim failed as matter of law, since reasonable trier of fact
3 could not find she was driven from workplace). A constructive discharge occurs when a person quits
4 his job under circumstances in which a reasonable person would feel that the conditions of employment
5 have become intolerable. Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1110 (9th Cir. 1998).
6 Generally, whether working conditions have risen to an “intolerable” level is a jury question. Sanchez
7 v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir. 1990), cert. denied, 502 U.S. 815, 112 (1991). But
8 there must be evidence presented that an employer has deliberately acted to make an employee's
9 working conditions so intolerable that the employee was forced to resign. Sneed v. Barna, 80
10 Wn.App. 843, 849 (1996). A plaintiff must demonstrate triable issues of fact as to whether a
11 reasonable person in his position would have been forced to quit as a result of intolerable and
12 discriminatory working conditions. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir.
13 1994). Courts typically look for either “aggravating circumstances” or a “continuous pattern of
14 discriminatory treatment.” Wunderly v. S.C. Johnson & Son, Inc., 828 F.Supp. 801, 806 (D.Or.
15 1993); see also Brady v. Elixir Indus., 196 Cal.App.3d 1299, 1306 (1988) (actions causing employee
16 to resign must be violative of public policy and intolerable at time of resignation; employer must have
17 actual and constructive knowledge of situation and could have remedied it). The existence of unlawful
18 discrimination alone is insufficient to support a finding of constructive discharge from employment.
19 Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 408 (1985). Failure to promote, in and of itself,
20 is also not sufficient to result in a constructive discharge. Grigsby v. North Miss. Medical Center, Inc.,
21 586 F.2d 457 (5th Cir. 1978). Plaintiff has not presented evidence of aggravating circumstances or
22 deliberate acts by Defendants at the time of his resignation by which a reasonable person could find a
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2 situation so intolerable that Plaintiff was forced to resign. Assuming that an implied constructive
3 discharge claim may be inferred from Plaintiff's complaint, it does not survive summary judgment.

4 **VI. Aiding and abetting claim**

5 Defendants do not offer any argument addressing this claim and why it should be dismissed on
6 summary judgment. Thus, Plaintiff's claim for aiding and abetting the commission of unfair practices
7 in violation of RCW 49.60.220 remains.

8 **CONCLUSION**

9 The Court DENIES Defendants' motion for summary judgment on Plaintiff's state law
10 discrimination, section 1981, and hostile racial environment claims, since Plaintiff has presented
11 sufficient evidence to raise a genuine issue of material fact as to these claims. The Court DENIES
12 Defendants' motion for summary judgment on Plaintiff's aiding and abetting unfair practices claim
13 because Defendants fails to present an argument as to this claim. The Court GRANTS Defendants'
14 motion for summary judgment on Plaintiff's retaliation claim and implied constructive discharge
15 claims, since on these claims, Plaintiff has failed to present evidence sufficient to raise a genuine issue
16 of material fact.

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18 Dated: November 10th, 2005.

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20 s/Marsha J. Pechman
21 Marsha J. Pechman
22 United States District Judge
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